

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BILLY G. METCALF, JR.
Claimant

VS.

IBP, INC.
Respondent
Self-Insured

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Docket No. 201,814

ORDER

Claimant requested review of the preliminary hearing Order of Administrative Law Judge Floyd V. Palmer entered in this proceeding on August 1, 1995. Appeals Board Member Gary M. Korte recused himself from this proceeding and Appeals Board Member Pro Tem Jeff K. Cooper served in his place.

ISSUES

The Administrative Law Judge denied claimant's request for benefits. In his Order, the Judge stated:

"Claimant has not carried his burden of proof on the issue of compensability. In addition, claimant did not give notice of accident within 75 days of the date he last worked for respondent and his claim is therefore barred."

Claimant requested this review and asks the Appeals Board to review the following issues:

- (1) Whether the claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent; and
- (2) Whether notice was timely given.

Respondent contends this review should be dismissed because claimant failed to timely file his Application for Review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, for purposes of preliminary hearing the Appeals Board finds as follows:

(1) Claimant timely filed his Application for Review and the Appeals Board, therefore, has the jurisdiction to review this preliminary hearing Order. Parties must request review of an administrative law judge's decision by filing written request with the Appeals Board within ten (10) days of the order. K.S.A. 1995 Supp. 44-551. The effective date of the judge's award or order is the day following the date noted in the document. K.S.A. 44-525. When counting days under the Act, the first day is excluded, and if the last day falls on a Saturday, Sunday or statutory holiday, it is excluded. K.A.R. 51-17-1. Based upon those rules, and because the tenth day (August 12) fell on a Saturday, the claimant's ten (10) day period to file his request for review commenced August 3, 1995 and ended August 14, 1995. Claimant filed his request for review on August 14, 1995 and, therefore, it was timely.

(2) Claimant sustained personal injury by accident arising out of and in the course of his employment with the respondent. This finding is based upon claimant's testimony that the work he performed for the respondent required repetitive use of his hands and the uncontroverted opinion of Dr. Michael L. Montgomery who relates claimant's work for the respondent to his carpal tunnel syndrome.

(3) Claimant provided timely notice of accident to the respondent. Dr. Montgomery saw claimant both on March 2 and 30, 1995 and diagnosed carpal tunnel syndrome. The doctor forwarded to the respondent copies of his office notes from both visits. The notes indicated claimant had carpal tunnel syndrome and that he needed surgery. On March 31, 1995, claimant took an authorization form to the respondent entitled Worker's Compensation Authorization for Proposed Procedure. The document indicated claimant was scheduled to have left carpal tunnel release surgery on April 14, 1995 and that he needed written authorization for the surgery from the workers compensation insurance carrier.

Under the facts presented, the Appeals Board finds the form requesting written authorization for treatment from the workers compensation carrier constitutes written demand for workers compensation benefits and also satisfies the requirement of notice of accident as contemplated by K.S.A. 44-520.

The Appeals Board finds claimant's last day of work for the respondent, February 3, 1995, is the date of accident for purposes of this injury. Because claimant was neither aware he had developed carpal tunnel syndrome nor that it was probably caused by the work he had performed for the respondent until he had consulted with Dr. Montgomery one month after leaving respondent's employ, the Appeals Board finds claimant has established just cause for failing to provide notice of accident within 10 days of his last day of work for the respondent.

Based upon the above, the preliminary hearing Order of the Administrative Law Judge should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Floyd V. Palmer, dated August 1, 1995, is reversed; that claimant has established for preliminary hearing purposes that he has sustained personal injury by accident arising out of and in the course of his employment with the respondent and that timely notice of accident was given. This case

should be, and hereby is, remanded to the Administrative Law Judge with directions to address any remaining issues and enter the appropriate orders consistent with the findings made herein.

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James L. Wisler, Topeka, Kansas
John D. Jurcyk, Lenexa, Kansas
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director